

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

THE BENNETT FUNDING GROUP, INC.

Debtors

CASE NO. 96-61376

Chapter 11

Substantively Consolidated

RICHARD C. BREEDEN, as Trustee for
THE BENNETT FUNDING GROUP, INC.
and THE PROCESSING CENTER, INC.

Plaintiff

vs.

ADV. PRO. NO. 97-70049A

SPHERE DRAKE INSURANCE PLC, SPHERE
DRAKE UNDERWRITING MANAGEMENT
(BERMUDA) LIMITED,
TRIANGLE INSURANCE MANAGEMENT LIMITED,
LLOYD THOMPSON LIMITED, THE BENNETT
FUNDING CORPORATION, BRIGHTON SECURITIES
CORP., HALPERT AND COMPANY, WEINER ABRAMS
& COMPANY INC., BANKERS FINANCIAL CORP.,
INTERNATIONAL FINANCE BANK, AMERICAN
TRAFFIC SAFETY SERVICE ASSOCIATION, INC.,
SUMMIT FINANCIAL SECURITIES INC., HEFREN
TILLOTSON, INC., HORIZON SECURITIES, SAGE-RUTTY
& COMPANY, MID-STATE ADVISORS, ANDREW
ANDREAS SPECIAL NEEDS TRUST, RICHARD H.
REYNOLDS PROFIT SHARING PLAN, INC.,
SOUTHEASTERN PAPER PROFIT SHARING PLAN,
FIRST FEDERAL SAVINGS BANK OF LAGRANGE,
GREATER DELAWARE VALLEY SAVINGS BANK,
MERCHANTS NATIONAL BANK OF WINONA,
FARMERS STATE BANK, THE COMMERCIAL BANK,
FIRST NORTHERN BANK & TRUST, LAFAYETTE
SAVINGS BANK, DOLLAR CAPITAL CORPORATION,
and JOHN DOES 1 through 10,000

Defendants

APPEARANCES:

SIMPSON THACHER & BARTLETT
Attorneys for § 1107 Trustee
425 Lexington Avenue
New York, New York 10017

MILBANK, TWEED, HADLEY & MCCLOY
Attorneys for Defendant Lloyd Thompson, Ltd.
1 Chase Manhattan Plaza
New York, New York 10005

CARPENTER, BENNETT & MORRISSEY
Attorneys for Halpert and Company
Three Gateway Center
100 Mulberry Street
Newark, New Jersey 07102

WILSON, ELSER, MOSKOWITZ, EDELMAN
& DICKER LLP
Attorneys for Defendants Sphere Drake Insurance
plc and Sphere Drake Underwriting Management
(Bermuda) Limited
150 East 42nd Street
New York, New York 10017-5639

RIVKIN, RADLER & KREMER
Attorneys for Triangle Insurance Management, Ltd.
EAB Plaza
Uniondale, New York 11556-0111

GREEN & SEIFTER
Attorneys for The Commercial Bank
One Lincoln Center
Syracuse, New York 13202

HANCOCK & ESTABROOK, LLP
Attorneys for Merchants Bank of Winona
1500 Mony Tower I
Syracuse, New York 13221

CONRAD K. HARPER, ESQ.
Of Counsel

SCOTT A. EDELMAN, ESQ.
Of Counsel
THOMAS A. ARENA, ESQ.
Of Counsel

MARC E. WOLIN, ESQ.
Of Counsel
MICHAEL S. WATERS, ESQ.
Of Counsel

LAURA EVANGELISTA, ESQ.
Of Counsel

WILLIAM M. SAVINO, ESQ.
Of Counsel
PIA RIVERSO, ESQ.
Of Counsel

ROBERT WEILER, ESQ.
Of Counsel

STEPHEN A. DONATO, ESQ.
Of Counsel

Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

On August 6, 1999, the Court issued a Memorandum-Decision, Findings of Fact, Conclusions of Law, Order and Recommendation (“August 1999 Decision”) in Adversary Proceeding 97-70049, which, *inter alia*, recommended that the U.S. District Court for the Northern District of New York (“District Court”) deny motions to dismiss, filed by Lloyd Thompson Limited (“Lloyd Thompson”) and Triangle Insurance Management Limited (“Triangle”) (collectively the “Movants”), with respect to Counts V and VI of the Second Amended Adversary Complaint filed by the chapter 11 trustee Richard C. Breeden (“Trustee”).¹

Presently before the Court is a motion for reconsideration (“Motion”) filed by the Movants on August 19, 1999.² By letter dated August 23, 1999, the Court advised the parties that it would not hear oral argument on the motion but would, instead, issue a written decision based upon the parties’ pleadings and memorandum.

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On March 29, 1996, The Bennett Funding Group, Inc. (“BFG”), Bennett Receivables Corporation (“BRC”), Bennett Receivables Corporation II (“BRC-II”), Bennett Management & Development Corporation (“BMDC”) filed voluntary petitions seeking relief under chapter 11 of the Bankruptcy Code. The Trustee was appointed trustee for each of them on April 18, 1996.

² In the alternative, Movants request that their motion be deemed an objection pursuant to Rule 9033(b) of the Federal Rules of Bankruptcy Procedure (“Fed.R.Bankr.P.”) to that portion of the August 1999 Decision which recommended that the District Court deny Lloyd Thompson and Triangle’s motion to dismiss Counts V and VI on the grounds that the Trustee has not pleaded fraud with particularity pursuant to Rule 9(b) of the Federal Rules of Civil Procedure, as incorporated by reference in Fed.R.Bankr.P. 7009. Pursuant to Fed.R.Bankr.P. 9033(d), it is for the District Court to review this Court’s findings of fact and conclusions of law upon which written objection has been made in a non-core proceeding and, therefore, Movants’ objection will not be addressed herein.

The Movants urge the Court to reconsider its finding that the Trustee had standing on behalf of BFG to assert claims of aiding and abetting fraud and breach of fiduciary duty against a third party. In its August 1999 Decision, the Court, citing to *Hirsch v. Arthur Andersen & Co.*, 72 F.3d 1085, 1088 (2d Cir. 1995) and *Shearson Lehman Hutton, Inc. v. Wagoner*, 944 F.2d 114, 120 (2d Cir. 1991), pointed out that “it is clear that if all shareholders of BFG had acquiesced in the fraud, the Trustee’s rights of action against Lloyd Thompson and Triangle would be precluded.” *See* August 1999 Decision at 26.

As of the petition date, Edmund T. Bennett and Kathleen M. Bennett (“Bennett parents”) were the sole shareholders of BFG. *See id.* at 7 n.1. The Court pointed out that the Trustee’s standing “will depend on proof of a number of specific facts which are not affirmatively alleged in his pleadings, such as the innocence of one or both Bennett parents and the existence of an officer or shareholder with the ability to prevent the fraud of Patrick Bennett.” *Id.* at 30. The Court found that Lloyd Thompson and Triangle had not cited to “any decision of this Court (or any other court) in which a judgment was entered based on the Trustee’s allegations that the Bennett parents knew of the Ponzi scheme.” *Id.* at 27.

Subsequent to the issuance of the August 1999 Decision, the Movants assert that they discovered that the Court had rendered judgment against the Bennett parents in a related adversary proceeding, *see Cordoba Corp., Bennett Funding Group Inc. and Bennett Management and Development Corp. v. Edmund T. Bennett and Kathleen M. Bennett (In re Cordoba Corp.)*, Adv. Proc. 96-70132A (Bankr. N.D.N.Y. Aug. 5, 1998) (“Cordoba Order”), and also had rendered judgment in a second adversary proceeding in which there were allegations made against the Bennett parents in connection with what the Trustee asserts was a Ponzi scheme, *see*

Richard C. Breeden Trustee v. Patrick R. Bennett, et al. (In re The Bennett Funding Group, Inc.), 220 B.R. 743 (Bankr. N.D.N.Y. 1997) (“October 1997 Decision”). Movants argue that those two judgments bar the Trustee from asserting the innocence of BFG’s sole shareholders, the Bennett parents. It is the Movants’ position that the Trustee lacks standing and, accordingly, the Court should reconsider its recommendation to the District Court that Counts V and VI be dismissed. *See Motion* at ¶ 12.

DISCUSSION

The Court in rendering its August 1999 Decision was aware of its two earlier decisions/judgments to which the Movants now refer. In the Cordoba Order, the Court made factual findings that the Bennett parents as officers and directors of BFG, as well as Cordoba Corporation, had expended at least \$456,500 in corporate funds for the purchase, operation and maintenance of a yacht known as The Lady Kathleen solely for their personal use and enjoyment. Accordingly, the Court concluded that the Bennett parents had breached their fiduciary duties to BFG and Cordoba Corporation and had committed corporate waste. It appears that Movants believe that the Court, having determined that the Bennett parents “looted” the corporate coffers in connection with the purchase and operation of The Lady Kathleen, should also conclude that the Bennett parents had knowledge and/or participated in other acts of looting which eventually led to BFG’s ultimate insolvency. While that fact may eventually be established, there was nothing in the Cordoba Order to indicate that it was based on any finding by the Court that the Bennett parents had knowledge of a Ponzi scheme involving the operations of BFG.

The October 1997 Decision was issued in connection with the Trustee's motion for partial summary judgment "on the [Trustee's] claim that the sale of the Hotel Syracuse on or about March 1, 1996, and the modifications to BMDC's notes and mortgages on the Hotel Syracuse attendant therewith, was a fraudulent conveyance and should be avoided" *See* October 1997 Decision, 220 B.R. at 747. The Trustee's complaint commencing that adversary proceeding contains allegations that the Bennett parents had either knowingly participated with their son, Patrick Bennett, in various alleged fraudulent activities in connection with the operation of BFG or were negligent in their fiduciary duties as officers and directors in overseeing the business affairs of BFG and related corporate entities, *see* Trustee's First Amended Adversary Proceeding Complaint, filed August 30, 1996 ("Amended Complaint") at ¶¶ 1, 61-70. However, as counsel for the Trustee correctly points out in objecting to the Motion herein, the Court, in rendering its October 1997 Decision in connection with the Trustee's motion for partial summary judgment, focused only on ¶¶ 176-184 of the Amended Complaint, which involved allegations concerning the conveyance of the Hotel Syracuse by entities other than the Bennett parents. In its October 1997 Decision, the Court made no findings or conclusions concerning the alleged involvement of the Bennett parents in the so-called Ponzi scheme, leaving those matters to be addressed at trial.

Neither judgment/order entered in the above-referenced adversary proceedings was "based on the Trustee's allegations that the Bennett parents knew of the Ponzi scheme." Therefore, neither judgement/order precludes the Trustee from asserting on behalf of BFG claims of aiding and abetting fraud and breach of fiduciary duty against the Movants.

Based on the foregoing, it is hereby

ORDERED that Lloyd Thompson and Triangle's motion seeking reconsideration of the August 1999 Decision insofar as this Court recommended to the District Court the denial of their motions to dismiss Counts V and VI of the Trustee's Second Amended Adversary Complaint (Adv. Proc. 97-70049A) is denied.

Dated at Utica, New York

this 28th day of December 1999

STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge